University of San Francisco Law Review

VOLUME 23
1988-1989

Copyright © by University of San francisco School of Law 1988

UNIVERSITY OF SAN FRANCISCO LAW REVIEW

Volume 23 Summer 1989 Number 4

BOARD OF EDITORS

Editor-in-Chief
KATHRYN HEATHER

Managing Editor
DEBORAH MCBRIDE

Executive Editor
KATHERINE W. MUNSON

Articles Editors
BRUCE PHILLIPS
JOYCE M. SACCHETTI

Comments Editors
DAVID R. MCDONALD
MEGAN B. SMITH
RANDALL J. SPERRING

Nonprofit Comments Editor
SANDRA J. SMITH

SENIOR STAFF MEMBERS

GREGORY V. BAKA
JEFFREY L. BERK
SHERYL L. BRATTON
DIANE C. ERICKSON
JEFFREY A. EVANS
MELINDA C. GROEN
MARK P. HARRIS
MADISON C. JELLINS
MARK E. KUSHNER
CHARLES M. MILLER
MOLLY O'NEAL
ELIZABETH F. OTEY
KRISTINE L. POOLE
RICK RUDERMAN
LAURA M. SAGMEISTER
JERRY SCHREIBSTEIN
ANNE MARIE SCHUBERT
ANDREW M. SCHUMACHER
LISA A. SEDRAKIAN
DONNA SOLOMON
GREGG THORNTON
WILLIAM WHEELOCK
MATTHEW J. WITTEMAN

STAFF MEMBERS

MARGARET M. BAUMGARTNER
CHERYL BEEM
JOSHUA A. BLOOM
LISA BRADLEY
JOHN A. BURKE
MELANIE DARLING
G. DAVID GODWIN
GAYLE L. GOUGH
EDWARD S. GRENVILLE
KATHLEEN DILLON HUNT
TEKE KELLEY
DEBORAH A. KEMP
VIVIAN Y. LEUNG
CRAIG A. LIVINGSTON
JOHN M. MONTEROSSO
JEANNE G. ROSENFIELD
DAVID B. TILLOTSON
KAREN A. TORME
ANDREW D. WATRY
DAVID E. WEISS

ADVISORY COMMITTEE

HONORABLE IRA A. BROWN, JR.
EUGENE C. CREW, ESQ.
JOANNE M. GARVEY, ESQ.
JAY JACKSON, ESQ.
DANIEL J. KELLY, ESQ.
HONORABLE STANLEY MOSK
HONORABLE FRANK K. RICHARDSON

FACULTY ADVISORS

JEFFREY S. BRAND
PETER J. DONNICI
J. THOMAS MCCARTHY

SPECIAL ADVISORS

Civil Procedure
C. DELOS PUTZ, JR.

Nonprofit Organizations
MICHAEL C. HONE

Assistant to the Editors
TERESA ROMAN-MICEK

UNIVERSITY OF SAN FRANCISCO
SCHOOL OF LAW

REV. JOHN LOSCHIAVO, S.J., S.T.L., President of the University
FAY L. BOWER, D.N.Sc., Interim Vice President for Academic Affairs
DAVID L. RATNER, A.B., LL.B., Dean of the School of Law
JOHN M. ADLER, A.B., J.D., Associate Dean for Academic Affairs
VIRGINIA J. KELSH, B.A., M.S.L.S., J.D., Law Librarian

FACULTY

JOHN M. ADLER, A.B., J.D., Assistant Professor of Law
WILLIAM W. BASSETT, A.B., M.A., S.T.L., J.C.D., J.D., Professor of Law
JEROME BORISON, B.S., J.D., L.L.M., Visiting Associate Professor of Law
JEFFREY S. BRAND, A.B., J.D., Assistant Professor of Law
JOHN F. DENVIR, B.S., J.D., LL.M., Professor of Law
PETER J. DONNICI, B.A., J.D., LL.M., Professor of Law
DOLORES A. DONOVAN, B.A., J.D., Professor of Law
JOEL EICHENGRUN, Visiting Associate Professor of Law
JACK I. GARVEY, B.A., J.D., Professor of Law
TRINA GRILLO, A.B., J.D., Assistant Professor of Law
JOSEPH T. HENKE, B.A., J.D., LL.M., Professor of Law
MICHAEL C. HONE, B.S., J.D., Professor of Law
PETER JAN HONIGSBERG, B.A., J.D., Assistant Professor of Law and Director of the Legal Research and Writing Program
FREYA HORNE, B.A., J.D., Clinical Assistant Professor of Law
VIRGINIA J. KELSH, B.A., M.S.L.S., J.D., Librarian and Associate Professor of Law
J. THOMAS MCCARTHY, B.S., J.D., Professor of Law
PAUL L. MCKASKLE, B.S., J.D., Professor of Law
RONALD H. MICON, B.A., J.D., Associate Professor of Law
SUZANNE E. MOUNTS, B.A., J.D., Professor of Law
THOMAS A. NAZARIO, B.A., J.D., Director of the Community Legal Education Program
DAVID B. OPPENHEIMER, B.A., J.D., Clinical Assistant Professor of Law
JOHN DE J. PEMBERTON, B.A., LL.B., Professor of Law Emeritus
JOHN A. POWELL, B.A., J.D., Assistant Professor of Law
C. DELOS PUTZ, JR., B.A., J.D., Professor of Law
DAVID L. RATNER, A.B., LL.B., Professor of Law
CHARLES A. REICH, A.B., LL.B., Marshall P. Madison Visiting Professor of Law
ELDON H. REILEY, B.S., J.D., Professor of Law
JOSHUA D. ROSENBERG, B.A., J.D., LL.M., Professor of Law
STEVEN F. SHATZ, B.A., J.D., Phillip and Muriel Barnett Professor of Trial Advocacy
NERISSA SKILLMAN, B.A., J.D., Assistant Professor of Law
ROBERT E. TALBOT, B.A., J.D., Associate Professor of Law
STEPHANIE M. WILDMAN, A.B., J.D., Professor of Law

UNIVERSITY OF SAN FRANCISCO LAW REVIEW
NONPROFIT ADVISORY COMMITTEE

MR. ROBERT S. BROMBERG, Paxton & Seasongood
PROFESSOR HARVEY DALE, New York University School of Law and Director, Program on Philanthropy and the Law
MR. JOHN EDIE, General Counsel, Council on Foundations
PROFESSOR IRA ELLMAN, Arizona State University School of Law
PROFESSOR PAUL DIMAGGIO, Director, Program on Nonprofit Organizations, Institution for Social and Policy Studies, Yale University
PROFESSOR HENRY HANSMANN, Yale Law School
PROFESSOR MICHAEL C. HONE, University of San Francisco School of Law
PROFESSOR WILLIAM HUTTON, Hastings College of the Law, University of California
MS. CAROLE KORNBLUM, Deputy Attorney General for the State of California
MR. DANIEL KURTZ, Private Practitioner
PROFESSOR LIZABETH MOODY, Cleveland-Marshall College of Law
MR. MARTIN PALEY, Foundation Executive
PROFESSOR STEVE SCHWARZ, Hastings College of the Law, University of California
MR. THOMAS SILK, Private Practitioner
PROFESSOR JOHN SIMON, Program on Nonprofit Organizations, Institution for Social and Policy Studies, Yale University

INDEX TO VOLUME XXIII

AUTHOR INDEX TO ARTICLES, COMMENTS, AND NOTES

ADLER, BETSY BUCHALTER AND COLVIN, GREGORY L. AND SILK, THOMAS: Annual Survey of Federal Tax Law and California Legislation Affecting Nonprofit Organizations: 1988 541

BENNETT, BARRY: Cost-Benefit Analysis, The Market, and Political Legitimacy 23

BIRMINGHAM, ROBERT L.: Why is There *Taylor v. Caldwell*? Three Propositions About Impracticability 379

BLOOM, JOSHUA A.: The Use of Local Ordinances to Combat Private Club Discrimination 473

BRADLEY, LISA AND BURKE, JOHN AND HUNT, KATHLEEN AND TORME, KAREN: 1988 Survey of Nonprofit Case Law 581

DENVIR, JOHN: "Ronnie and Roberto" 409

EVANS, JEFFREY ALAN: Denaturalization/Deportation: What Standards for Withdrawing the Welcome Mat? 415

FALK, THEODORE C.: Converting From a Nonprofit to a Business Corporation 443

FISHER, KEITH R.: Federalism Contra Federal Reservism: Bank Holding Companies and State Powers 317

GOUGH, GAYLE: *United States Catholic Conference v. Abortion Rights Mobilization, Inc.* 499

HEALY, MICHAEL T.: Liability of Electric Utilities for Unintended Power Outages 75

JELLINS, MADISON C.: Section 301 and Random Drug Testing by Employers: Are California State Constitutional Claims Preempted? 221

KEMP, DEBORAH: *NCAA v. Tarkanian* 521

MCBRIDE, DEBORAH HOLMES: The NCAA Drug-Testing Program and the California Constitution: Has California Expanded the Right of Privacy? 253

MILLER, CHARLES: The Navajo-Hopi Relocation Act and the First Amendment Free Exercise Clause 97

OPPENHEIMER, DAVID BENJAMIN AND BAUMGARTNER, MARGARET M.: Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies? 145

RUDERMAN, RICK: The Uncertain Legal Status of Teacher Strikes in California 193

SCHUBERT, ANNE MARIE: Compelled Consent to Release of Foreign Records—Taking the Fifth: *Doe v. United States* 291

SMITH, MEGAN BETHIA: Environmental restrictions or Land Use Regulation—The Supreme Court Draws a Distinction: *California Coastal Commission v. Granite Rock Co.* 123

STARING, GRAYDON S.: The Law of Reinsurance Contracts in California in Relation to Anglo-American Common Law 1
WILLIAMS, DANIEL R.: Law, Chess, and Ideals 399

TITLE INDEX TO ARTICLES, COMMENTS, AND NOTES

ANNUAL SURVEY OF FEDERAL TAX LAW AND CALIFORNIA LEGISLATION AFFECTING NONPROFIT ORGANIZATIONS: 1988. By *Thomas Silk, Betsy Buchalter Adler, and Gregory Colvin* 541

COMPELLED CONSENT TO RELEASE OF FOREIGN RECORDS—TAKING THE FIFTH: *Doe v. United States*. By *Anne Marie Schubert* 291

CONVERTING FROM A NONPROFIT TO A BUSINESS CORPORATION. By *Theodore C. Falk* 443

COST-BENEFIT ANALYSIS, THE MARKET, AND POLITICAL LEGITIMACY. By *Barry Bennett* 23

DENATURALIZATION/DEPORTATION: WHAT STANDARDS FOR WITHDRAWING THE WELCOME MAT? By *Jeffrey Alan Evans* 415

EMPLOYMENT DISCRIMINATION AND WRONGFUL DISCHARGE: DOES THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT DISPLACE COMMON LAW REMEDIES? By *David Benjamin Oppenheimer and Margaret M. Baumgartner* 145

ENVIRONMENTAL RESTRICTIONS OR LAND USE REGULATION—THE SUPREME COURT DRAWS A DISTINCTION: *California Coastal Commission v. Granite Rock Co.* By *Megan Bethia Smith* 123

FEDERALISM CONTRA FEDERAL RESERVISM: BANK HOLDING COMPANIES AND STATE POWERS. By *Keith R. Fisher* 317

LAW, CHESS, AND IDEALS. By *Daniel R. Williams* 399

THE LAW OF REINSURANCE CONTRACTS IN CALIFORNIA IN RELATION TO ANGLO-AMERICAN COMMON LAW. By *Graydon S. Staring* 1

LIABILITY OF ELECTRIC UTILITIES FOR UNINTENDED POWER OUTAGES. By *Michael T. Healy* 75

THE NAVAJO-HOPI RELOCATION ACT AND THE FIRST AMENDMENT FREE EXERCISE CLAUSE. By *Charles Miller* 97

THE NCAA DRUG-TESTING PROGRAM AND THE CALIFORNIA CONSTITUTION: HAS CALIFORNIA EXPANDED THE RIGHT OF PRIVACY? By *Deborah Holmes McBride* 253

NCAA v. Tarkanian. By *Deborah Kemp* 521

"RONNIE AND ROBERTO." By *John Denvir* 409

SECTION 301 AND RANDOM DRUG TESTING BY EMPLOYERS: ARE CALIFORNIA STATE CONSTITUTIONAL CLAIMS PREEMPTED? By *Madison C. Jellins* 221

1988 SURVEY OF NONPROFIT CASE LAW. By *Lisa Bradley, John Burke, Kathleen Hunt, and Karen Torme* 581

THE UNCERTAIN LEGAL STATUS OF TEACHER STRIKES IN CALIFORNIA. By *Rick Ruderman* 193

United States Catholic Conference v. Abortion Rights Mobilization, Inc. By *Gayle Gough* 499

THE USE OF LOCAL ORDINANCES TO COMBAT PRIVATE CLUB DISCRIMINATION. By *Joshua A. Bloom* 473

WHY IS THERE *Taylor v. Caldwell*? THREE PROPOSITIONS ABOUT IMPRACTICABILITY. By *Robert L. Birmingham* 379

TOPICAL INDEX TO ARTICLES, COMMENTS, AND NOTES

BANKING LAW

Federalism Contra Federal Reservism: Bank Holding Companies and State Powers 317

CONSTITUTIONAL LAW

Compelled Consent to Release of Foreign Records—Taking the Fifth: *Doe v. United States* 291

The Navajo-Hopi Relocation Act and the First Amendment Free Exercise Clause 97

Environmental Restrictions or Land Use Regulation—The Supreme Court Draws a Distinction: *California Coastal Commission v. Granite Rock Co.* 123

The NCAA Drug-Testing Program and the California Constitution: Has California Expanded the Right of Privacy? 253

NCAA v. Tarkanian 521

Section 301 and Random Drug Testing by Employers: Are California State Constitutional Claims Preempted? 221

The Use of Local Ordinances to Combat Private Club Discrimination 473

CONTRACTS

Why is There *Taylor v. Caldwell*? Three Propositions About Impracticability 379

CRIMINAL PROCEDURE

Compelled Consent to Release of Foreign Records—Taking the Fifth: *Doe v. United States* 291

DRUG TESTING

The NCAA Drug-Testing Program and the California Constitution: Has California Expanded the Right of Privacy? 253

Section 301 and Random Drug Testing by Employers: Are California State Constitutional Claims Preempted? 221

ECONOMIC ANALYSIS

Cost-Benefit Analysis, The Market, and Political Legitimacy .. 23

EMPLOYMENT LAW

Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies? 145

ENVIRONMENTAL LAW
Environmental Restrictions or Land Use Regulation—The Supreme Court Draws a Distinction: *California Coastal Commission v. Granite Rock Co.* 123

IMMIGRATION LAW
Denaturalization/Deportation: What Standards for Withdrawing the Welcome Mat? 415

INDIAN LAW
The Navajo-Hopi Relocation Act and the First Amendment Free Exercise Clause 97

INSURANCE LAW
The Law of Reinsurance Contracts in California in Relation to Anglo-American Common Law 1

LABOR LAW
Section 301 and Random Drug Testing by Employers: Are California State Constitutional Claims Preempted? 221
The Uncertain Legal Status of Teacher Strikes in California .. 193

LEGAL THEORY
Law, Chess, and Ideals 399
"Ronnie and Roberto" 409

NONPROFIT ORGANIZATIONS
Annual Survey of Federal Tax Law and California Legislation Affecting Nonprofit Organizations: 1988 541
Converting From a Nonprofit to a Business Corporation 443
NCAA v. Tarkanian 521
1988 Survey of Nonprofit Case Law 581
United States Catholic Conference v. Abortion Rights Mobilization, Inc. 499
The Use of Local Ordinances to Combat Private Club Discrimination 473

SPORTS LAW
The NCAA Drug-Testing Program and the California Constitution: Has California Expanded the Right of Privacy? 253
NCAA v. Tarkanian 521

TAX
Annual Survey of Federal Tax Law and California Legislation Affecting Nonprofit Organizations: 1988 541

Converting From a Nonprofit to a Business Corporation 443
1988 Survey of Nonprofit Case Law 581
United States Catholic Conference v. Abortion Rights Mobilization, Inc. 499

UTILITIES
Liability of Electric Utilities for Unintended Power Outages .. 75